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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL,

Petitioners

versus

SILAS MASON COMPANY,

Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

ORIGINAL BRIEF OF PETITIONERS.

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This case is pending here on writ of certiorari granted by this Honorable Court to review the final judgment in a civil case of the United States Circuit Court of Appeals for the Fifth Circuit.

OPINION OF THE COURT BELOW

The original judgment of the Fifth Circuit Court of Appeals was entered December 12th, 1947 (R-251), and

rehearing was refused, without opinion, January 15th, 1948 (R-269). The opinion is reported in 164 F. (2d) 1016.

JURISDICTION OF THIS COURT.

Jurisdiction was invoked under Section 240(a) of the Judicial Code, as amended (28 U.S.C.A., Section 347). Jurisdiction was urged: (1) Because of the paramount public importance of the issues raised, requiring interpretation of provisions of the Fair Labor Standards Act involved in a multitude of cases now pending in the lower federal courts; (2) because of the conflict between the decision of the Seventh Circuit Court of Appeals, in *BELL vs. PORTER, 159 F. (2d) 117*, and the decision below; and (3) the apparent conflicts between the decision below and relevant decisions of this Court, viz.: *ALABAMA v. KING & BOOZER, 314 U.S. 1; BUCKSTAFF CO. v. McKINLEY, 308 U.S. 358; CURRY v. UNITED STATES, 314 U.S. 14; PENN DAIRIES v. MILK CONTROL COMM., 318 U.S. 261.*

Because the case is so plainly within the letter of the Statute and the Rules of the Court governing this discretionary jurisdiction, because the Court apparently has not postponed any question of jurisdiction, and because opposing counsel has informally notified us that he proposes no challenge to the jurisdiction, further discussion of this point is not, at this stage, deemed necessary, and is withheld.

SUMMARY STATEMENT OF THE CASE.

Petitioners (not firemen) sued for overtime, penalties, and attorneys' fees, said to be due them under the

Fair Labor Standards Act of June 25, 1938 (c-676, 52 Stat. 1060, 29 U.S.C.A. 201 et seq.), by the Silas Mason Company, a cost plus a fixed fee contractor with the United States Government. The Silas Mason Company firstly constructed an ordnance plant for the Government, after which it operated this facility for the Government under the conventional wartime cost plus a fixed fee contract, and it was during the operation of this facility, in making munitions for war, that petitioners worked.

A motion for summary judgment was filed by the Silas Mason Company (R-19), setting out that the plant belonged to the Government, the title to the raw materials processed into munitions was at all times in the Government, and that the Silas Mason Company shipped out these munitions upon orders of the Government, for the prosecution of the war by the Government and its allies. The contract with the Government was attached, from which it was apparent that this was the standardized wartime cost plus a fixed fee contract. At this plant, petitioners engaged in the manufacture, fabrication, and loading of shells, munitions, bombs, and other materials and products, which were shipped out of the State of Louisiana during the conduct of the war (R-2, 21). Petitioners' work related to the manufacture of these munitions (R-3, 21). The plant and equipment used in the production activities, as well as goods worked on, were the property of the United States (R-21); and the contract, pursuant to which the Silas Mason Company constructed and operated the plant, refers to that Company as a contractor and provides that the contractor is the manufacturer of, or

a regular dealer in, the materials, supplies, articles or equipment to be used or manufactured, in the performance of the contract (R-48). The contract provides that petitioners and other employees "shall be subject to the control, and constitute employees of, contractor" (R-45, 113). The contractor was to receive specified fees from the contract, in addition to reimbursement for costs (R-21), but the contract provided for renegotiation of these fees "to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits" (R-128 -c). The contract contemplated compliance by the Silas Mason Company with various federal and state regulatory statutes applicable to private employers, such as complying, in appropriate situations, with the Eight-Hour Law (R-38, 39, 40, 41, 43) and with the Walsh-Healey Act (R-47, 51, 116). Compliance with the Social Security Act was required because included among the reimbursable costs (R-54). The Silas Mason Company was required to adhere to local Workmen's Compensation Laws and to "procure all necessary permits and licenses, obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory or subdivision thereof wherein the work is done, or of any other duly constituted public authority" (R-75). The Silas Mason Company bought the raw materials in the open market, but under the contract (R-73) it was stipulated that title vested in the Government from the moment of acquisition by the Silas Mason Company.

The district judge granted the motion for summary judgment upon the theory that the munitions work-

ed on by the petitioners for transportation outside the State of Louisiana did not constitute interstate commerce, within the meaning of the Fair Labor Standards Act, because the goods were the property of the United States during their manufacture and interstate transportation (R-232, 239).

The Fifth Circuit Court of Appeals affirmed by an en banc court, Judge Hutcheson dissenting. Besides agreeing with the district judge that the petitioners were not engaged in the production of goods for commerce, the Fifth Circuit Court of Appeals additionally held that the Silas Mason Company was not an independent contractor, because the Government exercised a continuing supervision over the manufacture of the munitions (R-251).

Additionally, the Fifth Circuit Court of Appeals held that this contract between the Silas Mason Company and the Government, being under the authority of Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, entitled "An Act to Expedite the Strengthening of National Defense"), petitioners were therefore actually employees of the War Department.

It was also held, by the Fifth Circuit Court of Appeals, that the United States would be exempt in the situation presented here, under sub-paragraph "I" of Section 3 of the Fair Labor Standards Act, which exempts from operation of the Act "goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than the producer, manufacturer, or processor thereof".

Petitioners seek relief herein by certiorari.

SPECIFICATIONS OF ERROR.

The decision below is erroneous in the following respects:

I.

In holding that the respondent was not an independent contractor, but a mere agency of the United States.

II.

In holding that petitioners were, in fact, employees of the War Department, in that they were governed, in their labors on these munitions, by the provisions of the Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A. 189(a)); that consequently they are not entitled to the benefits of the Fair Labor Standards Act.

III.

In holding that the munitions of war, in the production of which petitioners labored, were not "commerce" within the meaning of the Fair Labor Standards Act.

IV.

In holding that the munitions of war, in the production of which petitioners labored, were not "goods" within the definition of Section 3(i) of the Fair Labor Standards Act, because of the exemptive proviso of that Act pertaining to the goods in the hands of the ultimate consumer, in this case the United States, who was not the producer, manufacturer, or processor thereof.

SUMMARY OF THE ARGUMENT.

We epitomize the argument:

I.

We urge that the cost plus a fixed fee contract here involved was substantially identical with that dealt with by this Court in the case of *ALABAMA v. KING & BOOZER, 314 U. S. 1* and other cases, by the measure of which respondent was an independent contractor and petitioners, perforce, his employees; that petitioners' relation to respondent had all of the usual incidents of an employer-employee relationship; and that the mere fact that the War Department maintained close supervision of this operation and could require respondent to discharge an employee in order to insure the safety of the plant and its efficiency, were wholly insufficient to rob respondent of its independent status.

II.

We urge that the provisions of the Act of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A. 189(a)) authorizing the Secretary of War to construct ordnance plants and other facilities through the medium of cost plus a fixed fee contracts, gave him the election to operate these plants either by government personnel or through the medium of qualified commercial agencies; that in this case he availed himself of the services of a qualified commercial agency, expert in manufacturing, and that this Act provides only for the hours, and rate of pay, for employees of the War Department — meaning that the con-

ditions of labor of petitioners would be prescribed by this Act, had the Secretary of War elected to operate the facility himself (which he did not); but the Act being wholly silent as to the working conditions which were to obtain in the event that the Secretary of War availed himself of the services of another, as here, it is clear that the provisions of the Fair Labor Standards Act were to prevail.

III.

We urge that the munitions produced here, by the fact of transportation alone beyond state lines, meet precisely the definition of "commerce" set out in the Act; that the inclusion of the word "transportation" itself inescapably points this conclusion; that transportation, vel non, has always been regarded by this Court as commerce; and that many cases by this Court, beginning with *GIBBONS v. OGDEN, 9 Wheat. 1, 6 L. Ed. 23*, to and including *UNITED STATES v. SOUTHEASTERN UNDERWRITERS' ASS'N., 322 U.S. 533*, have held that commerce is not confined to the concept of trade and traffic; that outside the immediate area of conflict, war is not the antithesis of commerce, but often a stimulant; and that Congress, in excluding the Government from the Act, limited it to government in the ordinary sense; that the Government here is only collaterally affected, and that decisions of this Court, interpreting the letter, the spirit, and the purpose of the Fair Labor Standards Act, compel petitioners' inclusion.

IV.

We urge that the exemptive provisions of Section 3(i) of the Fair Labor Standards Act, excluding goods after delivery into the actual physical possession of the ultimate consumer, do not apply here because of no clear showing that the United States was the consumer of all these munitions, in view of "Lend-Lease"; that, in any event, the United States did not have actual physical possession of these munitions, but merely constructive possession through respondent, an independent contractor, until after the productive processes had ended — that is, when the government ordered the munitions loaded onto railroad cars; that it has always been the view of the Administrator, concurred in by several of the Circuit Courts, that this exemptive provision of Section 3(i) was inserted in the Act for the sole purpose of insulating an innocent shipper of goods produced under sub-standard conditions against the penal provisions of Section 15 of the Act; that to take the theory of the court below on this point would permit, and invite, wholesale evasions of the Act and remove from the beneficent provisions of that Act large groups of workers.

SPECIFICATION OF ERROR NO. 1.

Respondent an Independent Contractor — Not a Mere Agent of the Government.

A prime reason for the decision below was the theory that the respondent was not an independent contractor but a mere agent or instrumentality of the Government, and hence, that petitioners were employees of the War Department. The cost plus a fixed fee contract which obtained in this case seems to be a standardized form used by the government for the securing of supplies during the late war. This Court has had occasion to consider the precise relationship of a contractor to the government, under such a contract, several times heretofore. *ALABAMA v. KING & BOOZER, 314 U.S. 1, 87 L.Ed. 3; CURRY v. U. S., 314 U.S. 14, 86 L. Ed. 9; PENN DAIRIES v. PA. MILK CONTROL COMM., 318 U.S. 261, 86 L. Ed. 748.*

The *KING & BOOZER* case involved an Alabama sales tax on materials purchased by the contractor to build facilities for the government. The government intervened and contended that since it was the recipient of the materials sold to the contractor, taking title at the facility site, as here, the sales in reality were to the United States and not subject to local sales taxes. This Court held that the soundness of this contention "turns on the terms of the contract and the rights and obligations of the parties under it". The Court held that the contractor was the purchaser, not the government, and said:

"The contract provided that the title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the government, 'upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the contracting officer'."

A similar provision is incorporated into this contract (R-21).

The Court further said:

"* * * however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power give the contractors the status of agents of the Government to enter into contracts or to pledge its credits. *(U.S. v. DRISCOLL, 96 U.S. 421)*. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump-sum contract. *(JAMES v. DRAVO CONST. CO., 302 U.S. 134)*."

The case of *UNITED STATES v. COUNTY OF ALLEGHENY, 322 U.S. 174, 88 L. Ed. 1209*, does not derogate from the holding of this case. It merely declares that property of the United States, in the hands of a government contractor, is immune from local taxation. It did not hold that the contractor himself is immune.

Provisions of this contract are consistent only with the independent status of respondent. The contract declares (R-45, 113) that the employees "shall be subject to the control and constitute employees of the contractor".

It provided for renegotiation of excessive profits that might accrue to respondent (R-128). Profits are associated with the thought of an entrepreneur. The requirement of adherence to the Walsh-Healey Act (R-47, 50, 116) and to the Eight-Hour Law (R-38, 39, 41, 42 and 43), as well as the state Workmen's Compensation Laws (R-78) and the Social Security Act (R-54), is applicable only to the employees of a private entity.

The contract provided for fines, in certain contingencies, against the respondent, e.g., for failure to abide by the Eight-Hour Law (R-39) and the Walsh-Healey Act. If respondent is the government's agent, and not an independent contractor, we have the egregious situation of the government's imposing fines and penalties on itself. Such a stipulation, providing for fines or penalties in a similar situation, was characterized by this Court in *UNITED STATES v. DRISCOLL, (96 U.S. 421, 24 L. Ed. 847)*, as "incongruous with the idea of his being an agent and not a contractor". Respondent was required to abide by all local laws enforceable in the state, territory or subdivision wherein the work was being done. We are aware that the federal government seeks to abide by local restrictions in the interest of harmony and comity; but to impose it as a binding and legal obligation in all contingencies, on its mere agent, goes beyond the requirement of mere comity.

The hiring of petitioners by respondent was without any hindrance on the part of the government, initially, and the wages to be paid petitioners were not prescribed by

the Government, except the minima exacted by the Walsh-Healey Act, — and that was a requirement grading wages upward. The contract further provided that the contractor "is the manufacturer of, or a regular dealer in, the materials, supplies, articles, or equipment, to be manufactured or used in the performance of the contract" (R-48(a)). This is inconsistent with any notion that respondent was a mere agent.

But the court below, ignoring this indicia of independence, found that because of the general supervision which the government exercised over the work, and particularly its right to *require* the discharge of any employee (R-76), respondent was a mere agent. This provision, with reference to the discharge of an employee, (R-76) is in this verbiage: "The contracting officer may require the contractor to discharge from work any employee the contracting officer deems incompetent or whose retention is deemed to be not in the public interest". But this right of discharge on the part of the government is indirect. An apt comment on this, in *27 AM. JUR., Sec. 11, p. 492*, is as follows:

> "Sec. 11. * * * * Incidental powers retained by the employer over laborers, as the right to compel contractors to discharge workmen who are incompetent, although tending to show the contractors' subserviency, do not necessarily require that the contractors must be considered mere servants. In fact, provision for the discharge may tend to show the independence of the contractor, as, for instance, where the contract provides that the contractor shall discharge incompetent workmen in his employment * * * "

It is manifest that this requirement was inserted for security and efficiency reasons. This was a war project and success had to be assured, as well as complete protection against sabotage. Considered in the light of the additional fact that respondent had unlimited right, initially, to hire, and little restriction as to the wages, indicates that this situation is no different from that dealt with by this Court in *BUCKSTAFF v. McKINLEY, 308 U.S. 358, 84 L. Ed. 322*, where this Court said:

> "The control reserved by the government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See *FEDERAL COMPRESS & WAREHOUSE CO. v. McLEAN, supra (291 U.S. 17, 78 L. Ed. 622)*. That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See *JAMES v. DRAVO CONTRACTING CO., 302 U.S. 134, 82 L. Ed. 155*. In effect, petitioner concedes the point by admitting its liability under the Social Security Act."

Another circumstance apparently relied on by the Fifth Circuit below was this provision, quoted in the footnote to that opinion, relative to supervisory power:

> "Performance of the construction work of the entire project will be under the supervision of the contracting officers, appointed by the Quartermaster General."

THIS PROVISION RELATED TO THE CONSTRUCTION OF THIS PROJECT, NOT TO THE OPERATION OF THE PROJECT DURING WHICH TIME THESE PETITIONERS LABORED.

That in the operation of the plant the contract vested respondent with wide discretion as to the means of accomplishing the contract, and held it only for results, is apparent from the following:

> "In carrying out the work under this Title IV (meaning operations) the Contractor is authorized and shall do all things necessary or convenient in the operating, and closing down, of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor) * * *". (R-45)

From the general provisions of the contract it can be gleaned, it is conceded, that a representative of the Government was in attendance, but this circumstance does not destroy the independence of the contractor as demonstrated in *BUCKSTAFF v. McKINLEY (supra)*. Also see *CASEMENT & CO. v. BROWN, 148 U.S. 617, 37 L. Ed. 582.*

The third provision in the contract, relied on by the court below as supporting its position for the mere agency of the respondent, was this (R-16): "The government reserves the right to pay to the persons concerned all sums due from the contractor for labor, materials, and other charges". It is not claimed that this reservation was ever exercised. At no time did the Government pay these petitioners—they were always paid by respondent. Inasmuch as respondent did pay these petitioners, it is idle speculation as to what would occur had the government paid them. But even if the government had exercised its rights during the period in question, that is only one factor bear-

ing on the relationship, and is far from controlling. See *27 AM. JUR., verbo "Independent Contractors", Sec. 16, p. 497.*

Respondent Did Not Disclose Its Principal.

It is quite clear, from the provisions of this contract, that these petitioners dealt exclusively with respondent, — it hired them, worked them, and paid them. It deducted their pro rata part of the Social Security tax, and it provided them with Workmen's Compensation. For aught that appears here, these petitioners did not know the United States, or the War Department, to be here at all. There is no showing that the petitioners knew that this contract had existence, much less knew the details of it. In such a situation, — if, indeed, the Silas Mason Company was a mere agency of the government — it stands in the position of NOT HAVING DISCLOSED ITS PRINCIPAL, AND WOULD BE LIABLE TO THESE PETITIONERS BECAUSE THE CONTRACT WAS ITS OWN. See *FORD v. WILLIAMS, 21 Howard 287, 16 L. Ed. 56; NASH v. TOWNE, 5 Wall. 689, 18 L. Ed. 527; Sec. 322, RESTATEMENT OF THE LAW OF AGENCY, AMER. LAW INSTITUTE; STOREY on "Agency", Sec. 267.* Also see note, *6 A.L.R. 649*, for accumulation of cases. Hence, we urge that if this Court should find that the munitions produced here were "commerce" and "goods", then respondent would be liable to petitioners under the Fair Labor Standards Act, notwithstanding the fact that it was a mere agency of the United States, because, in its failure to disclose its principal, it made itself personally liable .

SPECIFICATION OF ERROR NO. 2.

Petitioners Not Governed By The Act of July 2, 1940.

The court below, besides the reasons hereinabove discussed — that petitioners were not governed by the Fair Labor Standards Act — additionally held that petitioners were, in reality, employees of the War Department because the contract, on its face, indicated that it was made on the authority of the Act of Congress of July 2, 1940 (Public No. 703, 76th Congress, 54 Stat. 712, 5 U.S.C.A. 189(a) (R-24).

This Act, in Section 1, authorized the Secretary of War, in his discretion, to acquire land for, and to build, among other things, ordnance plants for the manufacture of munitions, and to utiline, in his discretion, the services of cost plus a fixed fee contractors. Subsection (b) of Sec. 1 further provided, in part:

> "The Secretary of War is further authorized * * * *to provide for the operation and maintenance* of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorization contained in this section and section 5, either by means of Government personnel or *through the agency of selected qualified commercial manufacturers under contracts entered into with them*, * * * under such terms and conditions as it may deem advisable * * * ."
> (Emphasis ours)

Subsection 4(b) further provided:

"Notwithstanding the provisions of any other law,

the regular working hours of *laborers and mechanics employed by the War Department*, who are engaged in the manufacture or production of military equipment, munitions, or supplies, shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: Provided, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any work-week, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."
(Emphasis ours)

The respondent itself has never, up to this time, contended that this Act had application in this situation. However, both the district judge (R-233) and the court below found it controlling. The writer does not find, in the numerous cases in the lower courts which have dealt with this matter, any reference to this theory.

By Section 1 of this Act the Secretary of War may, in his discretion, operate these plants either: (1) Through the agency of qualified commercial manufacturers (as in our case here), or (2) through government personnel.

We urge that subsection 4(b), above quoted, providing for compensation for laborers and mechanics employed by the War Department, was inserted to secure to laborers on the project tolerable working conditions, only in the event that the Secretary of War elected to operate this facility through *Government personnel*. There is no provision in the Act as to wage rates and hours of em-

ployees of commercial manufacturers (as here), who made contracts with the Government to operate such a plant. This omission can only signify the intent of Congress for the latter employees to have the benefits of the Fair Labor Standards Act.

Moreover, subsection 4(b) provides only for "laborers and mechanics". This expression, "laborers and mechanics", has persisted in federal statutes since prior to 1900 (see *40 U.S.C.A. 321, 324, 325, 326*). It is fair to assume that the meaning of the expression in this Act of July 2, 1940, has the same meaning as has been ascribed to it in the previous Acts. *ELLIS v. UNITED STATES, 206 U.S. 246, 51 L. Ed. 1049 (excluding masters, mates, engineers, firemen); 1912 Op. Atty. Gen. 583 (excluding seamen); BREAKWATER v. UNITED STATES, 183 F. 112 (excluding seamen); GORDON v. UNITED STATES, 31 Ct. Cl. 254 (excluding watchmen); SWISHER v. UNITED STATES, 57 Ct. Cl. 123 (excluding firemen).*

There is nothing in the affidavit supporting summary judgment, or otherwise in this record, from which it can be determined that the petitioners here, who are described as safety inspectors and foremen, fall into the category of "laborers and mechanics". Hence, if this case should finally come to turn on this point, the matter would apparently have to be reversed for trial of this issue.

SPECIFICATION OF ERROR NO. 3.

Petitioners Produced for Commerce.

The third reason assigned below why petitioners should be denied, was that these munitions were not "commerce". The Act defines "commerce", in Section 3(b);

> "'Commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

The court reasoned that commerce was absent because: (1) the munitions were made for war, which is the negation or antithesis of commerce; (2) that it is not commerce, unless commercial; (3) that the government, in procuring these munitions, was performing an administrative act for the sovereign, which made them exempt. We will discuss these seriatim.

War Not Negation of Commerce.

Threaded throughout the opinion below, and boldly stated in the concurring opinion, is the concept that war is a negation of commerce, is wholly antipodal, and for that reason commerce could not exist in this situation. This idea has been expressed by other courts taking the same view. That idea is true only in part; in the area of hostilities, commerce does end, but outside of the immediate area of war, it is a stimulant of commerce. Such has been the history of this country. World War I generated general prosperity and produced many millionaires; World War II accelerated commerce in the United States to un-

precedented heights. There was a spurt of production, and a movement and interchange of commodities, beyond anything in our history, or the history of any other country, and almost beyond man's imagination. Commerce is necessary to war. Based upon its experience in the first World War, the Government in this war, by the device of renegotiation, provided for the scaling down of anticipated profits. It was provided for in this contract *(R-128)*. Here in Louisiana, at this plant site, thousands of miles from the area of conflict, war brought an immense spurt in industrial output. It did not retard commerce — it quickened it!

Commerce Need Not Be Commercial — Mere Transportation Suffices.

This obsession with the notion that war was a negation of commerce, even at points distant from the conflict, was based upon the false notion that commerce is an exchange of commodities, in a commercial sense, between the peoples of various states.

This narrow concept of commerce as being merely trade or traffic has never obtained in this country. "Commerce", in the Constitution, is without a definition, but this Court has, from earliest times, construed it to include more than trade or traffic, beginning with *GIBBONS v. OGDEN, (supra)* to and including *UNITED STATES v. SOUTHEASTERN UNDERWRITERS' ASS'N, 322 U.S. 533, 88 L. Ed. 1440.* In the latter case, the Court observed (at p. 549): "* * not only then may transactions be commerce, * * * though non-commercial * * * ."

Recently this Court held, in *NATIONAL LABOR RELATIONS BOARD v. FAINBLATT, 306 U.S. 600, 83 L. Ed. 1014, at p. 118:*

> "Transportation alone across a state line is commerce within constitutional control of the national government and subject to the regulatory power of Congress."

There are many other decisions of this Court, expressing the view that commerce need not be commercial, e. g., *GOOCH v. U.S., 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522 (kidnapped persons); BROOKE v. U.S., 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A.L.R. 1407 (stolen automobiles); WEBER v. FREED, 239 U.S. 324, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317 (prize fight films); HOKE v. U.S., 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523, 43 L.R.A., N.S., 906 Ann. Cas. 1913E, 905, and CAMINETTI v. U.S., 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 443, L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168 (women for immoral purposes); CHAMPION v. AMES (lottery case) 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (lottery tickets); REID v. COLORADO, 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (diseased stock); UNITED STATES v. SIMPSON, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A.L.R. 510* and *UNITED STATES v. HILL, 248 U.S. 420, 39 S. Ct. 143, 63 L. Ed. 337 (intoxicating liquors for personal use).* Also see *EDWARDS v. CALIFORNIA, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119.*

Here, the Congress was not satisfied with employing the naked word "commerce" as was done in the Con-

stitution, although that might have sufficed in view of this Court's interpretation of the word. It was careful to define it as including "transportation". This specification is consistent with the notion that the courts intended to extend it to every employee engaged in production for transportation alone.

It is significant that the definition of commerce in the National Labor Relations Act is precisely the same as in the Fair Labor Standards Act *(49 Stat. L. 449, Chap. 372, 29 U.S.C.A., Sec. 151, et seq.)*

The National Labor Relations Board, in interpreting the National Labor Relations Act, has, with remarkable consistency, held to the view that interstate commerce includes interstate transportation of property of the United States, to be used for military purposes and for other purposes. *WESTINGHOUSE ELEC. & MFG. CO., 38 N.L.R.B. 404, 412; UNITED STATES CARTRIDGE CO., 42 N.L.R.B. 191, 192; BROWN SHIPBUILDING CO., 57 N.L.R.B. 326, 328; ATLAS FENCE CO., 61 N.L.R.B. 984, 985; ODENBACH SHIPBUILDING CORP., 64 N.L.R.B. 1026, 1034; CARBIDE & CARBON CHEMICAL CORP., 73 N.L.R.B. 134, 135; REYNOLDS CORP., 74 N.L.R.B. No. 248.* Some of the lower federal courts have also taken the view that the transportation of goods for the convenience of the government was commerce. *BELL v. PORTER, 159 F. 2d. 117; CLYDE v. BRODERICK, 144 F. 2d 348; WALLING v. HAILE GOLD MINES, 136 F. 2d 102; TIMBERLAKE v. DAY & ZIMMERMAN, 49 F. Supp. 28; ROLAND v. UNITED AIR LINES, 75*

F. Supp. 25; JACKSON v. NORTHWEST AIR LINES, 75 F. Supp. 32; WALLING v. PATTON-TULLY CO., 134 F. 2d 945. See also *UMTHUM v. DAY & ZIMMERMAN, INC., 235 Ia. 293, 10 N.W. 2d 238.*

In the definition of "employee" in the Act, Section 3(e), these words are used: " 'employee' includes any individual employed by an employer". The word "any" is all-inclusive, and it certainly forecast the holding of this Court in *WALLING v. JACKSONVILLE PAPER CO., 317 U.S. 564, 87 L. Ed. 460,* where it was held that the Act was intended to extend to the utmost reach of interstate commerce specified in the Act. It specifies transportation.

Since the Act is remedial, those claiming exemption carry the heavy burden of persuasion and must show themselves excluded by both the letter and the spirit of the Act. *HELENA GLENDALE FERRY CO. v. WALLING, 132 F. 2d 616; FLEMING v. HAWKEYE PEARL BUTTON CO., 113 F. 2d 52.* Here, neither the letter nor the spirit admits the attempted exemption.

Unless the Fair Labor Standards Act be emasculated to nothing, it must be held to apply to contractors who, during the last war, and now, produce goods for the United States in the conventional way. This much was conceded by the court below in the use of this language: "If the defendant is engaged on this contract in the business of manufacturing munitions of war, either as a general proposition, or under a contract by which it agrees to produce and sell to the government either at a fixed price or at prices to be fixed from time to time, then we

are of the opinion that it would come within the Fair Labor Standards Act".

What difference can there be, essentially, in the working conditions of these petitioners here, making munitions for the United States government under a cost plus a fixed fee contract, as compared to those workers supplying goods for the United States in time of war or peace, such as the producers of trucks, oils, steel, and many other kinds of commodities?

Untoward consequences will result if this distinction between the ordinary contractors and cost plus a fixed fee contractors is adjudged, and between employees of the two kinds of contractors. What it means is, that workers for these two types of contractors, although they may be working toward the same end, under the some conditions, and making the same thing, for the army or the government, generally would be, quoad their employers, under different requirements as to the minima of wages and maxima of hours. There is no valid reason for this distinction. Judge Hutcheson, in his dissent below, aptly states what we seek here to protray:

> "I ask upon what permissible theory can it be claimed that appellants are not covered here, when it is conceded that had they been working for a private plant which made munitions for sale and delivery to the United States for war, they would have been. The munitions in both cases would be for purpose of war and not for ordinary trade, but in both cases they would have been produced for transportation from a state to a place outside thereof."

We understand that the underlying reason for cost plus a fixed fee contracts rested in the fact of advancing costs of production and the hesitation of would-be contractors to make flat bids on government projects. To insure the contractor against this extra hazard of advancing costs, the policy of cost plus a fixed fee contracts was inaugurated. THE GOVERNMENT OF THE UNITED STATES CERTAINLY DID NOT RESORT TO THIS DEVICE TO SAVE MONEY! Judge Sibley characterized the cost plus a fixed fee method as "the business folly of making cost plus a fixed fee contracts".

Here was the government, quite willing to pay out extra money in order to get supplies. Could it be that the government was partisan in its generosity and was ready to make guarantees to the contractor, regardless of the consequence to the government, yet, at the same time, pursued toward the employees of the contractor a policy of stint? Why did not the government manifest the same niggardly attitude toward employees of its other class of contractors?

Permeating the opinion below, and the opinions of other lower courts arriving at a similar result, is a notion that these suits have a touch of the immoral and the unpatriotic — that they are an attempted gouge of the government. BUT ALL THAT PETITIONERS SEEK HERE IS AN EQUALITY OF HOURS AND WAGES WITH OTHER EMPLOYEES OF CONTRACTORS FOR THE GOVERNMENT, DURING WARTIME, WHO, CONCEDEDLY, HAD THE BENEFIT OF THE ACTS.

The government used oil, steel, machinery, vehicles, and a thousand other commodities. These commodities were used for WAR, and were as necessary as were munitions.

Surely the Court can look through mere form, method, labels, or apparatus, to the reality of this situation. Nomenclature is not controlling. That was demonstrated in this Court's recent holding in *RUTHERFORD FOOD CORPORATION v. McCOMB, 329 U.S._____, 67 S. Ct. 1473*, decided June 10, 1947. Said the Court there:

> "The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under sub-normal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interference arising from production of goods under conditions that were detrimental to the health and well-being of workers. * * * Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' *label* does not take the worker from the protection of the Act."
> (Emphasis ours)

Congress Intended Coverage and Policy Requires It.

When this Act was passed in June, 1938, war, on a major scale, was in the offing. If not foreseen, at least the possibility of war was known to Congress, in view of our repeated experience with it. But, if war was not anticipated or taken into account, still Congress knew that the government had, from time immemorial, been making contracts with, and purchases from, private contractors,

some of them cost plus a fixed fee (see *UNITED STATES v. DRISCOLL, supra*). But the Act makes no exemption for employees of contractors for the government, of any kind whatsoever, whether conventional or cost plus a fixed fee. How then can the Court, as was done below, find a distinction between the two classes of contractors, where the Act makes none and history points to none?

When the war did come, with the expanded activities of the government, that did not cause Congress to amend this Act, although individual Congressmen thought it should be amended. We are informed, by the amicus curiae brief of the Department of Labor filed in the court below, that eighteen bills or resolutions were introduced in Congress, looking to the suspension of the Act during the war (Senate Bills Nos. 2232, 2373 and 2884, and House Resolutions Nos. 6617, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054 and 7731, of the 77th Congress, 2d Session; Senate Bills Nos. 190 and 237, and House Resolution No. 992 of the 78th Congress, 1st Session) none of which were passed. Obviously, such amendments were unnecessary, unless applied to the large group of people who were working for cost plus a fixed fee contractors.

Additionally, it is clear that Congress continued to have this view — the coverage of the Act —, because in the Portal to Portal Act of 1947 (Public Law 49, 80th Congress, Chap. 52) there is set forth, in Section 1, the Congressional finding that the cost to the government, under the Fair Labor Standards Act, required the Congress to act; and the Judiciary Committee, in its report on this bill, referred

to the fact that expenditures by the government for supplies, through the medium of cost plus a fixed fee contractors, amounted during the war to $40,000,000,000. Accordingly, Congress, both during and after the war, adhered to the view that the Act applied to cost plus a fixed fee contractors. Moreover, the Executive Department had the same view. Executive Order No. 9301, appearing in the appendix, established the 48-hour minimum workweek, but it was careful to provide that it should not be "construed as suspending or modifying any provision of the Fair Labor Standards Act". We quote Paragraphs 2 and 5 of this Order:

> "(2) All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this Order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose.
>
> "(5) Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U.S.C. 201, et seq.) or any other Federal, State or local law relating to the payment of wages or overtime."

Particular reference is made to the expression: "All departments and agencies of the federal government shall require *their contractors* * * ", and the expression: "* * * nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act". Note that there is no exemption of the cost plus a fixed fee contractor. It says: "* * * *their contractors*", which would certainly include all kinds of contractors with the government. The Congress could not have been unaware of this Executive Order, and if it did not express the intent of the Fair Labor Standards Act, doubtless the Congress would have acted. Besides, it is common knowledge that the President, then Mr. Roosevelt, and the Congress during his regime, were thoroughly committed to the retention, during the war, of what has come to be called "labor's gains", embodied, in part, in the Fair Labor Standards Act.

That Procurement of Munitions Was Administrative Not Significant.

Inferentially below, and expressly in other decisions, commerce is said not to be involved in this situation because the procurement of these munitions was an administrative activity of the sovereign. Under Section 203(d) of the Act, it is provided:

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when

acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

It is only under subsection (d) immediately above quoted that the United States Government is expressly or impliedly referred to.

The Government is not the employer here. In the contract is a disclaimer by the government that it is the employer. There is nothing in the statute itself elsewhere, to indicate that Congress intended that the words of the statute excluding the Government should be taken in other than the ordinary meaning. We submit that, according to ordinary understanding, the Government does not stand here as the employer, rather than the respondent.

An act of the Government is none the less administrative if in time of peace, instead of war. If the Act is deemed inapplicable because the procurement of these munitions was an administrative act, it would exclude great segments of the working population because *all* workers under government contracts would be excluded. In other, but analogous, situations, exclusion on this argument has been denied. Take the case of the United States mails — as relates to the National Labor Relations Act, employees for contract mail carriers have been held as in commerce. *N.L.R.B. v. CARROLL, 120 F. 2d 457.* As relates to the Fair Labor Standards Act, employees of contract mail carriers have been adjudged under the Act. *THOMPSON v. DAUGHERTY, 40 F. Supp. 279; FLEMING v. GREGORY, 36 F. Supp. 776; MAGANN v.*

TRANSPORTATION CO., 39 F. Supp. 742. In the case of *WALLING v. PATTON-TULLEY TRANSPORTATION CO., 134 F. 2d 945,* employees of an independent contractor on dyke and revetment work on the Missouri and Mississippi Rivers were subject to the Fair Labor Standards Act. Insofar as levees and their repairs are concerned, that is certainly administrative activity. In fact, to a limited extent the federal government owns these rivers, but not, of course, as fully as it owned the munitions in this case. But counsel, in the court below, urged that general legislation does not include the sovereign, unless by express words or compelling implication, citing *UNITED STATES v. HOAR, 2 Mason 311, UNITED STATES v. GREEN, 4 Mason 427; UNITED STATES v. HUGHES, 26 Fed. Cases 297;* and *DOLLAR SAVINGS BANK v. UNITED STATES, 86 U.S. 227.* Overlooked, however, is the fact that the existence of the government of the United States was manifestly considered by the lawmakers and fully provided for to the extent intended by the sole mention of the government in sub-section (d) of Section 203 of the Act quoted above.

Moreover, the rule of the *HOAR, HUGHES,* and *DOLLAR SAVINGS BANK* cases, supra, applies only in the situation where the Government is in litigation. In all these cases, the Government was a party. Here the Government is not a party, and is affected only because, by contract, the results of this law-suit may touch the Government. But the fact that the Government may be affected has, by this Court, been held not to insulate the cost plus

a fixed fee contractor from the burdens of his contract. *ALABAMA v. KING & BOOZER, CURRY v. UNITED STATES*, supra. In those cases, the Court was solicitous to preserve local rules, regulations and laws. Surely Congress did not intend for a national policy, embodied in the Fair Labor Standards Act, to be frustrated in a situation where care is taken to permit the operation of local policies. This precise argument was presented and rejected in an identical situation in the Supreme Court of Iowa, in the case of *UMTHUM v. DAY & ZIMMERMAN*, (supra). We excerpt from that case:

> "The statement of Justice Story in the *HOAR* case is by no means a hard and fast rule by which the sovereign is excluded from general terms of a statute; the purpose, subject matter, context, legislative history and executive interpretation are aids to construction which may indicate an intent to bring the sovereign within the scope of the law. *UNITED STATES v. COOPER CORPORATION, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071, 1074, 1075, Roberts, J.* 'Cases in which the doctrine of the *HOAR* case have been applied are of two classes: (1) Those where the act, if the sovereign were not excluded, would deprive it of a recognized or established prerogative title or interest. A classic example of these cases is *UNITED STATES v. HOAR* itself, holding the sovereign is exempt from general statutes of limitations. (2) Those where the act would work obvious absurdity if the public or its officers were not held to be impliedly excluded, as, for example, the application of a speed statute to a policeman pursuing a criminal or to a fire department responding to a fire alarm. *NARDONE*

v. UNITED STATES, 302 U.S. 379, 58 S.Ct. 275, 82 L. Ed. 314, 317, Roberts, J. Plainly, this case does not fall within either of these classes. The government is not a party to the case. It is not resisting plaintiff's action but on the contrary the Department of Labor has filed an *amicus curiae brief* urging a reversal. Plaintiff was not an employee of the government but of a private corporation.

"There is another recognized exception to the rule, if it can be called such, of *UNITED STATES v. HOAR.* Where a statute is for the public good or to prevent injury and wrong, the sovereign is bound by it although not particularly named therein. *NARDONE v. UNITED STATES, supra, 302 U.S. 379, 58 S.Ct. 275, 82 L. Ed. 314, 318; UNITED STATES v. HERRON, 20 Wall. 251, 22 L. Ed. 275, 276.* It would seem that the Act involved here was intended for the public good and to prevent injury and wrong."

SPECIFICATION OF ERROR NO. 4

Munitions Not Exempt as Goods in the Hands of the Ultimate Consumer.

Finally, it was held by the court below that the munitions manufactured here were excluded under the Act, by the provisions of sub-paragraph (i) of Section 3, which reads:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

It is said that the productive processes here, during which petitioners labored, did not occur until after these goods (or at least the raw materials from which the munitions were made) were delivered into the hands of the government of the United States, which was the ultimate consumer of the munitions; that the exemptive provision of the above quoted paragraph thus came into operation.

This view is untenable — firstly, because the exemption does not become effective until after delivery into the *actual physical possession* of the ultimate consumer. Here, the actual physical possession on the part of the Government did not come about, under any theory, until the goods were processed to completion and were loaded on railroad cars, and, it may be, not until the goods were de-

livered to the armed forces on the battle front. At any rate, the Silas Mason Company procured these goods in its own name, held these goods under a bailment, and processed them for the Government. Thus, the respondent had actual physical possession of these munitions, and the raw material out of which they were processed, during the critical interval — the interval of production. The Government had only the constructive possession. Constructive possession is no more than the legal presumption of possession which follows title, where the actual physical possession, as here, is in another, or in no one. *BROWN v. VOLKENING, 64 N.Y. 76, 80; ASHLEY CO. v. BRADFORD, 109 La. 642, 33 So. 634; HARRIS v. PAUL, 171 N.E. 615; C.I.T. CORP'N v. BILTMORE GARAGE, 96 pac. (2d) 247; LITTLETON v. ROBERTS, 187 S.E. 649.*

This Court had an analogous situation before it in *NATIONAL SAFETY DEPOSIT CO. v. STEAD, 232 U. S. 58, 58 L. Ed. 504.* Confronting the court there was the question of inter-relation between the bank, renting deposit boxes, and the renter — the question as to who had possession, and the kind of possession, as between the renter of the box and the bank. Justice Lamar of this court said:

> "Certainly the person who rented the box was not in actual possession of its contents, for the valuables were in a safe built into the company's vault and therefore, in a sense, under the protection of the house. The owner could not obtain access to the box without being admitted to the vault, nor could he open the box without the use of the company's master key."

A well established and ancient classification of possession has been into (1) constructive, and (2) actual physical possession. We have to assume that Congress acted knowingly and deliberately in selecting one class of possession over another. Had the government said the constructive possession of the ultimate consumer, or even the mere possession of the ultimate consumer, then this provision would operate; but having employed language which requires immediate corporeal contact, the words of the statute expressly exclude exemption.

This exemption is apparently designed to immunize the ultimate consumer himself, and him only. The respondent here was not the ultimate consumer, and surely it cannot claim an exemption designed for another.

The best statement on this facet of the problem, that we have found, is that of Judge Russell in *FLEMING v. ATLANTIC CO., 40 F. Supp. 654:*

> "Production of goods presupposes acts and employment prior to any delivery and there can be no reasonable construction of the statute which would relate the condition of goods after delivery to production. Goods cannot be produced after they are in the actual physical possession of the ultimate consumer. Statement of this term of the statute, with the exclusion appended, discloses the unreasonableness of such construction. Thus, 'every employer shall pay to each of his employees engaged in the production of goods, but not including goods after their delivery into the actual physical possession of the ultimate consumer thereof' makes no sense at all, if, as above stated, the production aimed at by the Act must precede the delivery."

For other cases discussing it, see *JACKSON v. NORTHWEST AIR LINES, supra; MOEHL v. E. I. DU PONT DE NEMOURS & CO., 12 Labor Cases, Par. 63, 545.*

It has long been the Administrator's view (see Paragraph 6 of Interpretive Bulletin No. 5, Revision of 1939, issued by the Administrator) that the purpose of Section 3(i) was intended to make effective the penal sections of Section 15 of the Act, so as to immunize the innocent shipper of goods produced contrary to the Act. This interpretation, while not controlling, is entitled to respectful consideration. *OVERNIGHT MOTOR TRANSPORTATION CO. v. MISSEL, 316 U.S. 572, 86 L. Ed. 1682.* To apply this exemption, as sought by respondent, would permit the exemption of production intended for commerce, contrary to the broad scope of the Act. What was happening here must not be lost sight of. Respondent acquired these raw materials from outside the State of Louisiana — metals and other products not obtainable in Louisiana — processed them immediately, and, on orders of the Government, shipped them out. It involved interstate commerce in two directions, — the inflow and the outflow — and it was, under any reasonable theory, a continuous process. The processing was simply a step in interstate commerce. In *BELL v. PORTER, supra*, the Seventh Circuit denied this exemption in these words: " * since the stoppage of the goods for the purpose of manufacturing and processing did not stop the flow of commerce". This Court itself long ago reached the same view in *STAFFORD v. WALLACE,*

258 U.S. 495, 66 L. Ed. 735. See also *SWIFT & CO. v. U.S., 196 U.S. 375, U.S. v. DARBY LUMBER CO., 312 U.S. 100.*

Unless the character of the sovereign insulates against liability in this situation, differentiating it from private entities, untoward and unexpected results will ensue. Take the case of a railroad owning coal mines. If the railroad should mine this coal itself, for consumption on its engines, it would then not have the benefit of the provision, because it excludes the ultimate consumer who is a "producer, manufacturer or processor"; but if the railroad utilized the medium of an independent contractor, the contractor would be exempt, says the respondent. Illustrations could be endlessly given. Take an automobile company which owned its own steel mills, such as Kaiser-Fraser and its Fontana plant, or the Pullman Company, making its own cars. This would offer an opportunity for wholesale evasion of the Act, so as to take large groups of productive workers, otherwise under the Act, out from its benefits, in what appears to be a wholly unexpected result.

Finally, it is not so clear on this record (summary judgment) as to preclude further inquiry, that the United States was the ultimate consumer of these munitions. It is true that Mr. Telford, who was General Manager for respondent, did state in the affidavit supporting judgment that the munitions were "shipped out of the said premises

for use by the armed forces in its war effort in the war with Germany, Japan, Italy and other nations" (R-21), still, it is apparent that Mr. Telford, who was not in the Government's employ, could have had no personal knowledge as to the actual use of these munitions. The munitions were used thousands of miles away from where Mr. Telford operated. It would be no part of his business to know, and we know that Mr. Telford, a private citizen, would not be given this information by the Government, for security reasons. There was no reason why he should know, and every reason why this kind of information would have been withheld from him.

It is true that we filed no affidavit controverting this, or any other, assertion in Mr. Telford's affadavit; but no one understood that this expression in his affidavit, adverted to just above, was to be taken to mean an assertion that the United States Government consumed all these munitions. Indeed, the expression "used by its armed forces" could well mean, and comprehend, use by the Allies. Allies we did have, thanks to a beneficent Providence, among whom were England, Russia and China, all of whom, as a matter of common knowledge, were known to have used great quantities of munitions produced in the United States. To so conclude is to ignore "Lend-Lease" (U.S.C. A. 20, Sections 411-423), and the billions of dollars spent for "Lend-Lease" purposes. Therefore, if this case comes to turn on this point, we respectfully suggest that it should be remanded for the taking of testimony on this point. The

burden of clearly and unequivocally supporting a claimed exemption rests upon him who asserts it — in this case, resting on respondent. It has not been discharged.

We therefore respectfully submit that this case should be reversed and remanded for trial.

Respectfully submitted,

LEONARD LLOYD LOCKARD
Attorney for Petitioners

I hereby certify that I have this_____ day of March, 1948 given copy of the above and foregoing brief to Charles D. Egan, Esquire, counsel for respondent herein, by manually placing same in his hands.

L. L. Lockard

APPENDIX "A"

48-HOUR MINIMUM WARTIME WORKWEEK

EXECUTIVE ORDER 9301

(22,855)

(Signed by the President, February 9, 1943.)

By virtue of the authority vested in me by the Constitution and statutes, as President of the United States, and in order to meet the manpower requirements of our armed forces and our expanding war production program by a fuller utilization of our available manpower, it is hereby ordered:

1. For the duration of the war, no plant, factory or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum workweek therein is less than 48 hours per week.

2. All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this Order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose.

3. The Chairman of the War Manpower Commission shall determine all questions of interpretation and application arising under this Order and shall formulate and issue such policies, directives, and regulations as he determines to be necessary to carry out this Order and to effectuate its purposes. The Chairman of the War

Manpower Commission is authorized to establish a minimum workweek greater or less than that established in Section 1 of this Order or take other action with respect to any case or type of case in which he determines that such different minimum workweek or other action would more effectively contribute to the war effort and promote the purposes of this Order.

4. All departments and agencies of the Federal Government shall comply with such policies, directives, and regulations as the Chairman of the War Manpower Commission shall prescribe pursuant to this Order, and shall so utilize their facilities, services, and personnel, and take such action under authority vested in them by law, as the Chairman determines to be necessary to effectuate the purposes of this Order and promote compliance with its provisions.

5. Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201, et seq.) or any other Federal, State or local law relating to the payment of wages or overtime.

APPENDIX "B"

Title 29, U.S.C.A., Section 206:

"ss 206. Minimum wages; effective date

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:-

(1) during the * * * * *

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of this Administrator issued under section 208 of this title, whichever is lower, and

(4) at any time after * * * * *

(5) if such employee is * * * * * , etc."

APPENDIX "C"

Title 29, U.S.C.A., Section 207:

"s 207. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ and of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek • • • •

(2) for a workweek • • • •

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer • • • • • etc."

APPENDIX "D"

Title 29, U.S.C.A., Section 215:

"§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate * * * * etc."